

IN THE UNITED STATES DISTRICT COURT  
IN AND FOR THE DISTRICT OF WASHINGTON

-----

RIVER CITY MEDIA, LLC, a	)	
Wyoming limited liability	)	
company, MARK FERRIS, an	)	NO. 1:17-CV-105-SAB
individual, MATT FERRIS, an	)	
individual, and AMBER PAUL,	)	
an individual,	)	
	)	
Plaintiffs,	)	
	)	
-vs-	)	
	)	
KROMTECH ALLIANCE CORPORATION,	)	
a German corporation, CHRIS	)	
VICKERY, an individual, CXO	)	
MEDIA, a Massachusetts	)	
corporation, INTERNATIONAL DATA	)	
GROUP, a Massachusetts	)	
corporation, and STEVE RAGAN,	)	
an individual, and DOES 1-50,	)	
	)	August 16, 2017
Defendants.	)	Yakima, Washington

-----

VERBATIM REPORT OF PROCEEDINGS  
MOTION HEARING

BEFORE THE HONORABLE STANLEY A. BASTIAN  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR PLAINTIFFS RIVER CITY  
MEDIA, MATT FERRIS, MARK  
FERRIS AND AMBER PAUL:

LEEOR NETA  
Attorney at Law  
600 California St., Floor 11  
San Francisco, CA 94109

JAKE BERNSTEIN  
Attorney at Law  
2101 Fourth Avenue, Suite 1500  
Seattle, WA 98121

1 FOR DEFENDANT KROMTECH  
2 ALLIANCE CORPORATION:

MATTHEW BROWN  
CHRISTOPHER B. DURBIN  
AMY McCOWAN SMITH  
Attorneys at Law  
101 California Street, 5th Floor  
San Francisco, CA 94111

5 FOR DEFENDANT CXO MEDIA  
6 AND INTERNATIONAL DATA  
7 GROUP AND STEVE RAGAN:

CHARLES L. BABCOCK  
WILLIAM J. STOWE  
Attorneys at Law  
1401 McKinney Street, Suite 1900  
Houston, TX 77010

9 KEVIN J. CURTIS  
Attorney at Law  
601 West Riverside, Suite 1900  
Spokane, WA 99201

11 FOR DEFENDANT CHRIS  
12 VICKERY: (Telephonically)

AARON V. ROCKE  
Attorney at Law  
101 Yesler Way, Suite 603  
Seattle, WA 98104

15 REPORTED BY:

Lynette Walters, RPR, CRR, CCR  
Official Court Reporter  
P. O. Box 845  
Yakima, WA 98907  
(509) 573-6613

18 Proceedings reported by mechanical stenography; transcript  
19 produced by computer-aided transcription.  
20  
21  
22  
23  
24  
25

I N D E X

Page

Defendant IDG's Motion to Dismiss

Defendant CXO Media's and Steve Ragan's  
Motion to Dismiss

Defendant Kromtech's Motion to Dismiss

Argument by Mr. Babcock	4
Argument by Mr. Stowe	11
Argument by Mr. Brown	17
Argument by Mr. Neta	26
Argument by Mr. Babcock	40
Argument by Mr. Brown	44
Argument by Mr. Neta	48

1 (AUGUST 16, 2017, 1:30 P.M.)

2 THE CLERK: The matter now before the court is River  
3 City Media, Mark Ferris, and Amber Paul versus Kromtech Alliance  
4 Corporation and others, Case No. 2:17-CV-105-SAB.

5 Counsel, please state your presence for the record,  
6 beginning with plaintiffs' counsel.

7 MR. NETA: Good afternoon, Leeor Neta for the  
8 plaintiffs.

9 MR. BERNSTEIN: Jason Bernstein for the plaintiffs.

10 MR. BABCOCK: Your Honor, Charles Babcock for three of  
11 the defendants, Mr. Ragan, IDG, and CXO.

12 THE COURT: Very good.

13 MR. STOWE: Your Honor, William Stowe, on behalf of  
14 IDG, CXO, and Mr. Ragan.

15 THE COURT: Very good.

16 MR. CURTIS: Your Honor, Kevin Curtis on behalf of  
17 those same three defendants, IDG, Ragan, and CXO.

18 THE COURT: Very good.

19 MR. BROWN: Matthew Brown for Kromtech Alliance Corp.

20 MR. DURBIN: Chris Durbin also for Kromtech, Your  
21 Honor. Good afternoon.

22 THE COURT: Good afternoon.

23 MS. SMITH: Amy Smith for Kromtech.

24 THE COURT: We have Mr. Rocke on the phone. Can you  
25 hear us okay, Mr. Rocke, or Rocke?

1 MR. ROCKE: Yes, Your Honor, I can hear. I just  
2 turned the phone up a little to try to hear better.

3 THE COURT: Is it Roche or Rocke?

4 MR. ROCKE: Rocke, Your Honor.

5 THE COURT: Okay. Apologize for that mistake.

6 I'm ready to proceed. I'm assuming that we can do the  
7 entire -- all of the hearings that we have pending in the next  
8 hour, but let's figure out how to proceed. We have three  
9 different filed motions, International Data's motion, which is  
10 at ECF No. 12, the motion filed by CXO Media and Ragan, which is  
11 at ECF No. 14, and the motions filed by Kromtech Alliance, which  
12 is at ECF No. 41.

13 And, so, I don't have a preference. Have you  
14 discussed how to proceed or who wants to go first? If there's  
15 an agreement, then let's do that. If not, I have a suggestion.

16 MR. BABCOCK: Can I go first? I think we just made an  
17 agreement that I would go first.

18 THE COURT: All right. That's fine.

19 The next thing -- and you can approach if you'd like,  
20 Mr. Babcock.

21 MR. BABCOCK: Thank you.

22 THE COURT: But the next thing we should talk about is  
23 how much time do you want, and, then, should we go to the other  
24 motions before we hear from the plaintiff? So I'm looking to  
25 the plaintiff. It seems easier if I just hear from you in

1 response to everything at once. If you wanted to respond to  
2 each of the three motions, I'll at least consider that.

3 How would you like to do that?

4 MR. NETA: I think that's fine, Your Honor. I'm happy  
5 to respond to all the motions at once, because I think the  
6 issues are very much related.

7 THE COURT: Yes, I think so, too.

8 Mr. Babcock, how much time you need on behalf of your  
9 clients?

10 MR. BABCOCK: Your Honor, on behalf of our clients, 20  
11 minutes; 15 to open, 5 to close.

12 THE COURT: All right. And, then, who's going to be  
13 arguing the other motions? Mr. Brown?

14 MR. BROWN: Yes.

15 THE COURT: Is anybody else going to be arguing?

16 MR. BABCOCK: Yes, Your Honor.

17 THE COURT: I just want to get a sense as to who we're  
18 going to be hearing from.

19 MR. BABCOCK: The IDG defendants, I was going to  
20 tackle the personal jurisdiction issue, and our alternative  
21 12(b)(6) motion, Mr. Stowe was going to argue.

22 THE COURT: All right. And, so, your 15 minutes, does  
23 that include both of your times?

24 MR. BABCOCK: Yes, and that would include both of us.

25 THE COURT: All right. So we'll do 15 minutes between

1 the two of you, and then 5 minutes at the end.

2 And, Mr. Brown, how much time do you think you're  
3 going to need?

4 MR. BROWN: I think about the same, Your Honor.

5 THE COURT: All right. 15 minutes. Well, that's a  
6 total of 30 minutes for the plaintiffs to respond to, and that  
7 gets us to 1:30. And, so, do you think 20 minutes -- and I'm  
8 not real tight on time. But if we start off with 20 minutes, do  
9 you think that will be enough for you to respond to both  
10 motions?

11 MR. NETA: At present, that sounds like enough.

12 THE COURT: Very good. All right.

13 Mr. Babcock, let's get started. I will watch the  
14 clock. As everybody in my chambers will tell you, I'm really  
15 bad at that. But I will try to give you about a two-minute  
16 warning, and I'll try to read the clock.

17 MR. BABCOCK: If you could give me a warning when I'm  
18 five to seven minutes in, and then I'll defer to Mr. Stowe.

19 THE COURT: Okay. Generally, in that time frame. All  
20 right. You may begin.

21 MR. BABCOCK: Thank you, Your Honor.

22 May it please the court, I was struck, in looking at  
23 the pleadings, about how nobody in this case is really connected  
24 to Washington. The first plaintiff, River City Media, is a  
25 Wyoming LLC. And we'd ask the court to take judicial notice of

1 the fact that River City Media is not licensed to do business in  
2 Washington. We had raised that in our briefing, and, frankly, I  
3 thought that perhaps that might alert somebody to go get  
4 registered, but we checked today, and River City Media is still  
5 not registered to do business in the State of Washington.

6 And that has an impact on our 12(b)(2) motion in two  
7 ways. One, on the reasonable tests, whether Washington has an  
8 interest in the adjudicating this dispute, we would say, because  
9 of the Revised Code of Washington, RCW 23.95.505(2), River City  
10 Media is not even entitled to bring an action until they do get  
11 registered and pay all the back taxes for whatever time period  
12 they have been doing business in the state. Their pleadings say  
13 that they are doing -- have been doing millions of dollars of  
14 business here, so there could be some issue with the Washington  
15 Secretary of State.

16 The second named plaintiff, Mr. Ferris, is a resident  
17 of Idaho, he says in his declaration, Document 23. The third  
18 named plaintiff, Ms. Paul, likewise, is a resident of Idaho.  
19 And Mr. Vickery, one of the defendants, is a California  
20 resident, according to his declaration. Kromtech, the plaintiff  
21 alleges, is a German company with its headquarters in Dubai.

22 And then we get to my clients. CXO is a Massachusetts  
23 corporation, as is IDG. And the defendant, Steve Ragan, the  
24 individual defendant, Steve Ragan, who's an employee of CXO, is  
25 a resident of Indianapolis, Indiana. There's no dispute about



1 that. That's either from the pleadings or the uncontroverted  
2 affidavit. So Washington, to us, doesn't seem to have much,  
3 much to do with this dispute.

4 As to IDG, the allegation was that IDG was the parent  
5 corporation of CXO. The declarations that have been filed --  
6 and they have not been controverted -- say that's not true. IDG  
7 is not in a parent/subsidiary relationship with CXO. IDG is  
8 merely a holding company.

9 There is no allegation as to general jurisdiction of  
10 any of my clients, CXO, IDG, or Mr. Ragan. Under the 2013 case  
11 of *Daimler v. Bauman*, there really could not be a credible  
12 allegation of general jurisdiction.

13 THE COURT: In the plaintiffs' complaint, they  
14 indicate, at paragraph 22, that IDG is the parent corporation of  
15 Defendant CXO. For purposes of the motion to dismiss, is that  
16 sufficient?

17 MR. BABCOCK: It is not if we controvert it. Once  
18 we -- it would be if we had not controverted it. But once we  
19 controverted it, then that goes away, and the burden shifts to  
20 the plaintiff to come up with some evidence that we are the  
21 parent.

22 In any event, it is, I think, well-established law  
23 that the acts of a subsidiary in the forum for the purposes of  
24 personal jurisdiction cannot be attributed to the parent. It  
25 really is of no moment here, because there are no acts of the

1 subsidiary that could be attributed one way or the other. But  
2 in answer to the court's question, yeah, that pleading goes away  
3 once we controvert it.

4 As to specific jurisdiction, again, another case from  
5 the United States Supreme Court, the *Walden* case, changed the  
6 law in this circuit. And, so, now, to sustain personal  
7 jurisdiction, the suit must arise out of or relate to the  
8 defendant's contacts with the state. The mere fact that  
9 defendant's conduct affects the plaintiffs in the forum is  
10 insufficient. And as I say, that, I think, changed the law in  
11 the Ninth Circuit.

12 IDG -- there is no showing that IDG did anything with  
13 respect to the plaintiff, whether it affected them in this forum  
14 or not. As for the other two defendants, there are allegations  
15 that they were in some sort of conspiracy or some sort of joint  
16 operation with the other defendants, most notably Mr. Vickery.  
17 A judge who I'm told is extremely wise wrote an opinion  
18 recently, 2015, in *Mirza Minds, Inc. v. Kenvox*, and that judge  
19 noted correctly, we think, that bare assertions that a defendant  
20 participated in the alleged conspiracy, and a legal conclusion  
21 that, therefore, there was business being conducted in  
22 Washington is insufficient, noting the Ninth Circuit precedent  
23 prohibiting the conspiracy theory of personal jurisdiction.

24 Here, with respect to all the claims, there's a single  
25 sentence that says --

1           THE COURT: I think you heard wrong about the wisdom  
2 of that --

3           MR. BABCOCK: Excuse me?

4           THE COURT: You heard wrong about the wisdom of that  
5 particular judge.

6           MR. BABCOCK: No, no. I'm standing my ground on that,  
7 Your Honor, I'm happy to say, since that opinion goes in our  
8 direction. If it had turned out otherwise, then we might have  
9 had a debate about it, but...

10           So I think IDG, there really isn't much of an argument  
11 to hold them in the case. And I am not a proponent of the  
12 English rule in terms of fee shifting, but in the case of IDG,  
13 I really do think that the court should look at Section  
14 4.28.185(5) and the cases under it, and consider, if you go in  
15 our direction, awarding fees to IDG. And we'd ask for the  
16 opportunity, if it happens that way, to submit our fee  
17 application and prove up our fees.

18           THE COURT: What I've done in the past -- and I'm not  
19 indicating to anybody how I might rule, but if I do rule in the  
20 way you're requesting, and you think fees are appropriate, you  
21 can do that with a subsequent motion.

22           MR. BABCOCK: Thank you, Your Honor. That was what I  
23 was suggesting, perhaps inartfully.

24           So we get to the three-part test for specific  
25 jurisdiction as to CXO and Mr. Ragan, did they purposely conduct

1 activities at the forum. And there is, other than this  
2 conspiracy, you know, sort of trying to bootstrap on  
3 Mr. Vickery's alleged conduct, there is nothing to suggest that  
4 this Indiana reporter working for a Massachusetts company  
5 directed their activities in Washington. He wrote an article.  
6 He clearly interviewed a California resident. And the article  
7 was published on the Internet. Nothing to suggest --

8 THE COURT: I was just about ready to give you a time  
9 signal.

10 MR. BABCOCK: He's so eager. You'll see.

11 THE COURT: Mr. Stowe was giving you one.

12 MR. BABCOCK: You'll see how eager he is.

13 So the first prong, we think, hasn't been met. And  
14 the second prong, the claims here do not arise from any activity  
15 that my clients engaged in in this forum. Again, the article  
16 was prepared in Indiana and published out of Massachusetts.

17 And then the reasonable test. The court's got -- the  
18 Ninth Circuit has seven factors. The court knows them as well  
19 as I do. It's in that masterful opinion that I cited earlier.

20 The only thing I would point out is Factor No. 4, the  
21 forum state interest in adjudicating this dispute. This forum,  
22 Washington, has absolutely no interest in adjudicating a dispute  
23 with a Wyoming LLC who has not bothered to register to do  
24 business in the State of Washington.

25 I would yield to Mr. Stowe.

1 THE COURT: All right. Thank you.

2 MR. STOWE: Good afternoon, Your Honor. William Stowe  
3 on behalf of IDG, CXO, and Mr. Ragan.

4 THE COURT: How much time, at this point, do you need?  
5 I'm going to be loose on the time, but we split up the 15  
6 minutes.

7 MR. STOWE: I'm going to try to knock this out in four  
8 or five minutes.

9 THE COURT: I'll give you a high sign at about five  
10 minutes.

11 MR. STOWE: Thank you, Your Honor.

12 Part of the reason I think I can knock it out in four  
13 or five minutes is because it's an alternative motion, and  
14 Your Honor doesn't even need to get to the Rule 12(b)(6)  
15 analysis if it concludes, as we think it should, that there's no  
16 personal jurisdiction.

17 But in any event, plaintiffs don't allege, or they  
18 fail to state a claim against CXO, IDG, and Mr. Ragan. And  
19 starting with IDG itself, plaintiffs allege no facts whatsoever  
20 of any conduct on the part of IDG, no participation in, engaging  
21 in, connection to, any of the allegedly unlawful conduct.  
22 There's just nothing against IDG.

23 Obviously, each one of the claims against IDG, against  
24 CXO, and Mr. Ragan, as well, each require conduct on the part of  
25 the defendant. They don't allege any conduct on the part of

1 IDG. What they do is they allege in paragraph 25, they make  
2 this conclusory assertion about agency and ratification. And we  
3 gave Your Honor several cases that say if a plaintiff is relying  
4 upon an agency theory, you have to plead specific facts  
5 supporting that agency theory. For example, Defendant A is able  
6 to control Defendant B, and, hence, Defendant A would be the  
7 principal of Defendant B. But you can't say, as they have done  
8 here, Defendant A is the principal for Defendant B. So all of  
9 the claims against IDG fail.

10 Similarly, the CFAA, the Computer Fraud, and the  
11 Stored Communications Act, ECPA, claims against CXO and  
12 Mr. Ragan fail because plaintiffs don't allege any intentional  
13 accessing without authorization of facility through which an  
14 electronic communication service is provided, or intentionally  
15 exceeding the authorization provided. It's all against  
16 Mr. Vickery.

17 And the same shortcomings that go against with respect  
18 to IDG also apply to CXO and Mr. Ragan. They don't allege the  
19 elements that I just mentioned with respect to the computer  
20 claims.

21 The Defend Trade Secrets Act, they don't allege any  
22 act of acquisition or disclosure against any of IDG, CXO, or  
23 Mr. Ragan. Those are required elements of the claim.  
24 18 U.S.C. § 1839, Subsection(5).

25 They also don't even identify what the trade secret

1 is. Failure to state a claim. You've got to tell us what  
2 the -- you don't have to go into specifics. That's why it's a  
3 trade secret. But you've got to at least say what it concerns,  
4 what that trade secret allows you to do. They don't do that.

5 Intentional infliction of emotional distress. They  
6 don't allege any conduct that is extreme or outrageous.  
7 Required element of the claim.

8 Invasion of privacy. Don't allege any facts regarding  
9 participation in the alleged intrusion into plaintiffs' private  
10 affairs.

11 Conversion. No allegation against any of IDG, CXO, or  
12 Mr. Ragan regarding interfering with plaintiffs' chattel. Same  
13 thing with interference with contractual relationship or  
14 business expectancies. No allegations of specific conduct.  
15 It's all about Mr. Vickery.

16 On to definitions. IDG, they don't even allege  
17 published anything. That's the most basic element of  
18 defamation. You've got to publish the statement; you've got to  
19 make the statement. IDG, they don't even allege did that. So  
20 that point fails. They don't state a claim against IDG for  
21 that.

22 And as to CXO and Mr. Ragan, they get a little closer,  
23 because at least they published an article, right? They make  
24 that allegation. But if you look at specific statements that  
25 they claim were defamatory, and they're all on paragraph 73,

1 none of those statements state a claim for defamation, for the  
2 reasons that we identify in our brief. A couple of them are  
3 pure nonactionable opinions.

4 Interestingly, the statement that River City, quote,  
5 exploited a number of providers in order to inbox offers,  
6 unquote, they claim that that was defamatory. And we gave  
7 Your Honor a case, *Paterson v. Little Brown & Co.*,  
8 502 F.Supp.2d 1124, which, similar context. It was allegations  
9 made in an article or publication regarding a computer  
10 programmer way worse than this exploiting a number of providers.  
11 There, they said in the statement that a computer programmer  
12 had, quote, ripped off, unquote, and taken a ride on another  
13 developer's operating software. The court said that was  
14 nonactionable opinion. If that's nonactionable opinion, this  
15 certainly, exploiting a number of providers, is not an  
16 actionable opinion.

17 And the other statements that they -- in the interest  
18 of time, I'm going to just kind of conclude here with respect to  
19 defamation.

20 THE COURT: You've got a couple minutes left.

21 MR. STOWE: Oh, I do. Okay.

22 All right. Well, the other statement, they quote  
23 Mike Anderson from Spamhaus, which is an organization, I  
24 believe, that goes against spamming. And they've got this quote  
25 that they complain about that's from the article. It's nobody



1 would knowingly give their e-mail address to spammers, so they  
2 have to be tricked into it. Again, that's nonactionable opinion  
3 about what this Mr. Anderson believes the public would or would  
4 not give to a spammer.

5 And, then, finally, the statement once we concluded  
6 that this was, indeed, related to a criminal operation, they  
7 claimed that was defamatory. That's a quote to Vickery. And  
8 they don't allege what "this" means in that.

9 And then they include one more statement, which is  
10 including a link. They say you included a link in your article,  
11 a hyperlink to the Vickery article, and that's defamatory. We  
12 gave Your Honor a very recent case from just last year, in 2016,  
13 where the Washington Court of Appeals said that merely including  
14 a hyperlink to another article that you say is defamatory is not  
15 a republication. And that case is *Life Designs Ranch, Inc. v.*  
16 *Sommer*, 364 P.3d 129.

17 So for all of those reasons, they don't state any  
18 claims against IDG, CXO, or Mr. Ragan. But, again, Your Honor  
19 doesn't even get there because there's no personal jurisdiction.

20 THE COURT: All right. Thank you.

21 Mr. Brown, should I time you at 15, leaving a few  
22 minutes in reserve for rebuttal?

23 MR. BROWN: Yes, please. That would be great.

24 THE COURT: All right.

25 MR. BROWN: Again, Matthew Brown for Defendant

1 Kromtech Alliance Corp.

2 I will also start with the personal jurisdiction  
3 argument. And I think, as Mr. Babcock alluded to, the Supreme  
4 Court, as well as the Ninth Circuit, but particularly the  
5 Supreme Court, has really tightened up personal jurisdiction  
6 jurisprudence over the last several years, and has made it clear  
7 that it is a high bar.

8 By way of prefatory remark, I would also say, even  
9 though it's our motion to dismiss, one thing that can easily get  
10 lost, and I think it was lost somewhat in the plaintiffs'  
11 opposition, is that it's really their burden to establish  
12 personal jurisdiction, at least the two prongs, the purposeful  
13 direction of conduct for the forum state, as well as the but-for  
14 test. That is, that that purposefully directed conduct must  
15 form the basis for the claims that are alleged in this  
16 litigation. That's the plaintiffs' burden. And, then, only if  
17 they've satisfied their burden on those two prongs does it shift  
18 to -- do you need to reach the reasonableness or due process  
19 prong at all.

20 Here, as with the other defendants, I don't think  
21 general jurisdiction is really on the table. They certainly  
22 don't raise it in their opposition.

23 So, turning to specific jurisdiction, on the  
24 purposeful direction prong, we'll put aside the issue, just for  
25 a moment, of agency. But with respect to Kromtech Alliance

1     itself, they have no employees here, they have no officers here,  
2     or anything like that. The two things that they appear to seize  
3     on in their opposition are what they characterize as two  
4     advertisements on two websites.

5             First of all, the evidence that they've put before the  
6     court is not competent evidence, and it should be disregarded.  
7     It's an attorney declaration that sort of describes, in a very,  
8     very vague way, these two advertisements, doesn't even bother to  
9     attach screenshots or copies of these things at all. So I think  
10    that should just be disregarded, as well as the URL that was  
11    provided that supposedly would lead to one of those two simply  
12    didn't work when you go plug that into a browser.

13            But even if that evidence were to be credited, even  
14    that doesn't show purposeful direction. We have put in  
15    declaration testimony from the CEO of the company that explained  
16    how this actually works. And it wasn't as though Kromtech  
17    Alliance set out to run ads on these Washington-based websites  
18    or the ad that was run by Yahoo!. Lot of people think of Yahoo!  
19    as a web portal, but they have a huge ad business, where they  
20    display ads for other people. And they have an arrangement with  
21    Yahoo!, but they don't tell Yahoo!, go direct this to  
22    Seattle-based papers websites. It's up to Yahoo! to figure out  
23    where to place those ads. So they just say here's an ad that  
24    we'd like to run. That's all in the record.

25            With respect to the second piece of evidence that

1 they've kind of generally described in the attorney declaration,  
2 the CEO of Kromtech has explained that was a press release that  
3 was simply given to a PRWeb, which is a very well-known sort of  
4 distribution company. And, again, there was no direction to  
5 PRWeb to target Washington in any way. It was just generally  
6 handed over a press release, and PRWeb, with its many, many  
7 relationships across the country, sent it out to a whole bunch  
8 of different news outlets.

9 Even if you were to get by all that and find that the  
10 purposeful direction prong were met, none of this --

11 THE COURT: But they did give direction to Yahoo! and  
12 others to place the ad?

13 MR. BROWN: That's correct. That's right. It's just  
14 that there was no direction to target the ad toward Washington  
15 state, which is really the key question for a personal  
16 jurisdiction analysis.

17 THE COURT: Was there a target or an instruction,  
18 place the ad, but only do it in our home state?

19 MR. BROWN: No. I mean, Kromtech is a foreign  
20 company. So it doesn't -- it's not even an American company at  
21 all.

22 THE COURT: But they can be sued in the United States.

23 MR. BROWN: Well, they -- if the requisite  
24 requirements for personal jurisdiction were established by  
25 plaintiff in a particular case.

1           THE COURT: When Kromtech made this arrangement with  
2 Yahoo! for the ads, did they understand that the ads would be  
3 placed within the United States, that users of Yahoo! within the  
4 United States would see these ads?

5           MR. BROWN: That's just not in the record. But in any  
6 event, even if you were to find that the purposeful direction  
7 were satisfied by plaintiff, none of this has anything to do  
8 with the claims at issue here. We're talking about generalized  
9 arguments that have nothing to do with the alleged hacking  
10 activity, nothing to do with the particular blog post at issue  
11 at all. So plaintiffs haven't carried the burden as to  
12 Kromtech's actual conduct.

13           Faced with those shortcomings on that set of facts,  
14 which clearly doesn't satisfy personal jurisdiction, they then  
15 shift to this agency theory. And we know from the *Wilcox* case,  
16 a Washington Supreme court case earlier this year, that the key  
17 consideration there is whether a company or a person has the  
18 right to control the details of another person's work; in other  
19 words, the right to control sort of the day-to-day activities.  
20 Merely having the right to, you know, sort of direct the end  
21 product or dictate what the end product is is not enough.

22           And if you look at the complaint itself, the four  
23 corners of the complaint, all you really have there is a lot of  
24 word play. They say in a number of places, which you see  
25 oftentimes in these complaints, that each defendant is the agent

1 of the other defendant. But that's conclusory and should be  
2 disregarded.

3 In their opposition brief, then, they tried to impute  
4 Mr. Vickery's activities to Kromtech and argue that he was their  
5 agent. But the problem there is that the complaint doesn't  
6 allege any facts that would show that Kromtech had the right to  
7 control the details of his work. And if they want to succeed on  
8 an agency theory for personal jurisdiction purposes, they have  
9 to do that, because that is the key consideration under the  
10 *Wilcox* case.

11 Now, I think we, frankly, could have stopped there and  
12 just pointed to four corners of the complaint, and I think we  
13 should win on personal jurisdiction. We elected to go farther.  
14 And we've put evidence in the record. And, so, in Mr. Sozniak's  
15 declaration, CEO of Kromtech, he's attached the agreement  
16 between Kromtech and Mr. Vickery. And as you'll see, he's not  
17 an employee, he's an independent contractor. It's an arm's  
18 length independent contractor agreement. And all that that says  
19 is it specified kind of the end product, right? He will provide  
20 some consulting services on security issues to the company up  
21 to, I think it was, ten hours a month. That's clearly not at  
22 issue at all.

23 And, then, the other part of it is that he was  
24 obligated to do two articles a month, essentially. And there's  
25 a general description of what those articles are to cover. But

1     there's nothing in the contract at all that gives Kromtech the  
2     right to control the details of any of his security research,  
3     behavior, no ability to control the content of the articles,  
4     exercise any creative control over the articles, any editorial  
5     control, none of that. And we've put that in the record so  
6     that, you know, we can't be accused of hiding the ball or being  
7     cute by only pointing to the allegations in the complaint.

8             I might also add that the blog where Mr. Vickery  
9     posted these two articles a month was called "Security Watch  
10    with Chris Vickery."

11            THE COURT: I should have given you the two-minute  
12    warning, but I haven't. I realize -- I told you I was bad at  
13    timekeeping. I've let you go on longer than I should have, but  
14    you can wrap up, and you can finish your thought.

15            MR. BROWN: Yeah. Maybe the last two things.

16            I sort of wanted to point out that, you know, I feel  
17    that the lengths that the plaintiffs have gone to here to  
18    persuade you of personal jurisdiction are pretty remarkable. In  
19    their opposition brief, they actually say that all of the  
20    plaintiffs, both River City Media, as well as all the individual  
21    plaintiffs, reside in Washington. That's in the opposition  
22    brief. But we know it's flatly contradicted by their own  
23    complaint, where they allege that it's a Wyoming LLC and --  
24    River City Media, that is, and the individual defendants are all  
25    residents of Idaho. So if you are even to get to the third

1     prong, and I don't think you even need to, that's something that  
2     should be taken into consideration in assessing reasonableness.

3             And I would point out the Ninth Circuit said, in the  
4     *Amoco Egypt Oil Co.* case -- this is a 1993 case that we cited.  
5     And they said there the unique burdens placed upon one who must  
6     defend oneself in a foreign legal system should have significant  
7     weight in assessing the reasonableness of stretching the long  
8     arm of personal jurisdiction over national borders. And that's  
9     the situation we have here.

10            THE COURT: Haven't those burdens changed since 1993  
11     in terms of, you know, Mr. Rocke is allowed to participate by  
12     phone. I do a lot of phone hearings. I do a lot of video  
13     conference hearings. Obviously, a trial is different. But very  
14     few cases actually go to trial. The defendants, who are all  
15     arguing that somehow this is burdensome, have found the means to  
16     send three attorneys each for a motion to dismiss. Haven't the  
17     burdens changed somewhat, given the electronic age we're in,  
18     which we were not in in 1993?

19            MR. BROWN: Well, technology has certainly changed,  
20     but I don't think it's -- not in a way that's material to this  
21     analysis. I mean, it certainly can't be the rule, and I'm  
22     positive there's case law on this, that simply hiring counsel to  
23     come and make a personal jurisdiction argument as opposed to  
24     defaulting and having a default judgment entered, that --

25            THE COURT: I guess my question is -- and I apologize



1 for interrupting you.

2 My question is this: Certainly, it's the plaintiffs'  
3 obligation to prove personal jurisdiction. And the standards  
4 haven't changed, and I'm not suggesting they should. But in  
5 terms of the one element, the burden, which all the courts who  
6 have discussed personal jurisdiction, they all talk about the  
7 burden of defending in a foreign jurisdiction, what is that  
8 burden in this electronic age? What is that burden?

9 MR. BROWN: Sure. Well, we don't have a client  
10 representative here today. We weren't going -- they weren't  
11 going to fly from abroad to attend this hearing, which would be  
12 their right. And you've got a lot of clients who would be  
13 highly interested in attending the hearings on their own case  
14 where plaintiffs are suing them for lots of money. And it makes  
15 it extraordinarily burdensome in terms of the time, in terms of  
16 the distraction from business, in terms of the expenses for them  
17 to get here. And, so, that applies --

18 THE COURT: Could have tied them in by phone.

19 MR. BROWN: That's different than being here in  
20 person.

21 THE COURT: Sure.

22 MR. BROWN: In terms of depositions, and trials, and  
23 the like, I understand your point that we are more -- granted,  
24 we are a more interconnected world than we used to be, and I'm  
25 not going to sit here and argue that we aren't. But when we're

1 talking about a company that has its principal place of business  
2 in Dubai, and here we are in the Eastern District of Washington,  
3 that has to be taken into account. And I think, you know, even  
4 though this is a Ninth Circuit decision in 1993, I think the  
5 general principle still stands and applies.

6 THE COURT: No. It's still good law. And I didn't  
7 mean -- sometimes what's important in 1993 changes by the time  
8 we get to 2017.

9 MR. BROWN: I guess I would just emphasize, you know,  
10 I wanted to make that final point in the event that Your Honor  
11 were to get to that third prong, but I just really think this is  
12 a case where they haven't even established the first two prongs  
13 and carried their own burden.

14 THE COURT: Thank you, Mr. Brown.

15 Is it Neta?

16 MR. NETA: Yes, Mr. Neta, Your Honor.

17 THE COURT: And I assumed you're going to be making  
18 the argument today.

19 MR. NETA: I am I.

20 THE COURT: Is your co-counsel going to split the time  
21 with you? He says no.

22 MR. NETA: We're okay. Thank you.

23 THE COURT: We agreed to 20 minutes, so I'll give  
24 you -- I'll try to give you a five-minute warning.

25 MR. NETA: I have the same response to what counsel

1 mentioned, so I want to invite you, of course, to interfere with  
2 any questions at any time.

3 First couple of things. Counsel for Kromtech  
4 indicates that River City Media is not registered to conduct  
5 business in Washington. But the fact of the matter is we have  
6 evidence that demonstrates that our business was located here,  
7 we had many employees in the State of Washington, we suffered  
8 reputational damage in the State of Washington. We can present  
9 evidence, certainly, on that issue. We lost our lease to our  
10 office building in the State of Washington.

11 THE COURT: Which means you had one.

12 MR. NETA: We had one, at least, when we were in  
13 active operation. Now the business has been completely  
14 eviscerated as result of defendant's conduct. We laid off  
15 numerous employees whose lives are in tatters, frankly, as a  
16 result. And I think there's enough evidence in the record at  
17 this point to suggest, Your Honor, that defendants could have at  
18 any point surmised that the plaintiffs are located in the State  
19 of Washington.

20 The fact that the business was not registered to  
21 conduct business in the State of Washington according to the  
22 Washington court rules specifically, or that the fact that the  
23 individuals may have resided in Idaho, right across that very  
24 porous border, really has nothing to do with anything when the  
25 damage was really felt here.

1           Counsel for IDG also mentioned that -- argues, as they  
2 did in their papers, that IDG is not a parent company, but a  
3 holding company. I just want to explore, Your Honor, that if a  
4 holding company is engaged primarily in a specific business or  
5 industry, and the subsidiaries are doing the work that the  
6 holding company would do, but for the existence of those subs,  
7 they are essentially a supercorporation. There's no difference.  
8 And, in fact, there's enormous amount of evidence, even at this  
9 early stage of the litigation, to suggest that IDG and CXO are  
10 essentially the same entity, the same --

11           THE COURT: But don't you have to plead that? I mean,  
12 that may be true. This isn't a motion for summary judgment.  
13 This is really a motion for both personal jurisdiction for all  
14 the defendants, but, then, also, a motion to dismiss for,  
15 really, inadequate pleading.

16           And did you plead that IDG, as either a parent company  
17 or a holding company, should be held responsible for its  
18 subsidiary, CXO, for the following factual reasons?

19           MR. NETA: I don't believe it's as clear as it could  
20 be. I certainly have to concede that. And if the response is  
21 that we simply need to amend it to more clearly characterize it  
22 with the evidence that we've obtained in the meantime related to  
23 the close interrelation of CXO and IDG, we're happy to do that.

24           But the notion that they're not deeply wedded together  
25 as a supercorporation, and that IDG can simply stand back, allow

1 the subsidiary, quote, companies to engage in conduct around the  
2 country, and it's not liable because it's standing aside isn't  
3 fair enough to absolve them from liability.

4 THE COURT: Well, that may be, but I think that's a  
5 different motion, a different time, if we get beyond this. You  
6 know, there are certain rules that you have to follow to pierce  
7 the corporate veil and to move from one corporate entity to  
8 another, if you want to do that, and you can try to do that if  
9 you want to.

10 The question is: Does this complaint sufficiently put  
11 the defendants and the court on notice in terms of what your  
12 theory is? And I, you know, I think the Ninth Circuit has  
13 instructed trial judges like me that if we're going to grant a  
14 motion to dismiss, that the plaintiff rarely -- rarely should  
15 the plaintiff not be given a chance to amend. So that probably  
16 would happen if I end up granting the motion to dismiss.

17 So I'm going to suggest it might be your best use of  
18 time today to talk about the personal jurisdiction --

19 MR. NETA: Understood.

20 THE COURT: -- because that's where I think, if I  
21 grant that motion, that's where your case is going to be over.

22 MR. NETA: That makes sense, Your Honor.

23 Let's talk about purposeful direction, then, first.  
24 As we indicate in our briefing, libel occurs wherever the  
25 offending material is circulated. And we've described a number

1 of cases that demonstrate. It doesn't really matter where the  
2 defendant is. Doesn't even really matter where the plaintiff  
3 is. If there's demonstrated harm in a given jurisdiction,  
4 that's enough for purposeful direction.

5 The victim of the libel, like the victim of any other  
6 tort, may choose to bring suit in any forum with which defendant  
7 has certain minimum contacts, such that maintenance of the suit  
8 does not offend traditional notions of fair play and substantial  
9 justice.

10 THE COURT: So that answers why Vickery is in this  
11 lawsuit. And I will take judicial notice of the fact that he  
12 doesn't have a pending motion, anyway, on personal jurisdiction.  
13 But how do we get personal jurisdiction against these other  
14 defendants who you're alleging were working or somehow  
15 responsible for Mr. Vickery?

16 MR. NETA: I think the evidence, if not as clearly  
17 stated as it could be in the complaint, certainly is stated well  
18 enough, I think, in our opposition and the record as it stands,  
19 that Mr. Ragan and Mr. Vickery were working hand in hand  
20 investigating River City Media, a company based in Washington,  
21 trying to undermine its business, posting defamatory statements  
22 about it online, that they were working hand in hand, it wasn't  
23 simply an issue of Vickery doing a lot of this work and handing  
24 it on a platter to Mr. Ragan, who then wrote a story about it.

25 THE COURT: So, in essence, Mr. Vickery's involvement,

1 and Mr. Ragan's involvement, at least your allegation, were  
2 really similar. They weren't employees, or they weren't  
3 business partners. They were working independently, but  
4 together, and, so, if we have jurisdiction over one, we have  
5 jurisdiction over the other.

6 MR. NETA: Precisely. And that, in turn, extends to  
7 CXO. CXO, for its part, makes no effort in its briefing to  
8 dispute the fact that Mr. Ragan is its agent.

9 And with respect to CXO/IDG, again, the question, I  
10 think, ultimately is, are these companies really a parent/sub  
11 sort of a scenario -- situation, or is it really a  
12 supercorporation in which they are so interrelated they're doing  
13 essentially the same thing.

14 THE COURT: So your argument in terms of personal  
15 jurisdiction over Kromtech is that Mr. Vickery was its agent?

16 MR. NETA: That's correct, Your Honor.

17 THE COURT: And in terms of Mr. Ragan/CXO, Mr. Ragan  
18 was CXO's agent?

19 MR. NETA: That's correct, Your Honor.

20 THE COURT: We have a different level of involvement  
21 with IDG, but that's a different issue.

22 MR. NETA: True.

23 Kromtech, for its part, engages Mr. Vickery, executes  
24 this contract. Now, Mr. Brown suggested earlier that Kromtech  
25 doesn't really have any control over Mr. Vickery's actions.

1 THE COURT: But that's a motion for summary judgment,  
2 isn't it?

3 MR. NETA: I would think so, too. And I would think  
4 the contract, in and of itself, probably demonstrates at least  
5 the requisite consent/approval conduct required. Because I  
6 don't think there's any dispute Mr. Vickery couldn't blog  
7 whatever he wanted on a website that was owned by Kromtech under  
8 the MacKeeper.com domain name. It asserted some control over  
9 him.

10 And you're right, to the extent there's an open  
11 question on that, let's take discovery on that and address it on  
12 a summary judgment motion.

13 As I said, I don't think there's any dispute in the  
14 record, at least at this point, that Ragan, Mr. Ragan, is CXO's  
15 agent.

16 THE COURT: So how do we get personal jurisdiction  
17 over IDG?

18 MR. NETA: Well, given that CXO published this article  
19 online, they circulated in Washington, they knew Washington  
20 citizens would read it just because of the fact that the  
21 business was located here. It was easy enough for them to find  
22 that out. They targeted Washington consumers. They knew that  
23 it would be of interest to Washington residents.

24 If you take all that evidence, and you marry the fact  
25 that CXO and IDG are essentially the same thing, that's how you



1 get IDG in the State of Washington.

2 THE COURT: Okay. Is there any dispute between the  
3 parties as to whether Mr. Vickery was actually the -- or  
4 Mr. Ragan -- so I guess my question is to both -- whether they  
5 were the trespassers, I would say, the people who snooped into  
6 your clients' computer information and trespassed, I'll call it.

7 MR. NETA: As far as I know, Your Honor, there's no  
8 dispute on that issue. And there's an enormous amount of  
9 evidence that we've collected that connects each of these pings  
10 and efforts to unlawfully access our servers --

11 THE COURT: I'm not asking for your opinion.

12 MR. NETA: Okay.

13 THE COURT: I'm just wondering --

14 MR. NETA: If it's at issue.

15 THE COURT: -- is that at issue?

16 MR. NETA: I don't believe it is, Your Honor, no.

17 THE COURT: Okay. I've chewed up a lot of your time,  
18 but you still have plenty.

19 MR. NETA: You're welcome to.

20 So in terms of purposeful direction, I think we've  
21 addressed that question. They produced articles, they  
22 circulated them in the State of Washington, they knew that the  
23 harm would be felt there. Despite their assertions to the  
24 contrary, I think there's enough circumstantial evidence to  
25 suggest they should have known that or did know that.

1           And as we've discussed, and as I think the defendants  
2 do not dispute, defamation occurs in the state where the harm is  
3 most likely to be felt. And that was felt here. Certainly,  
4 there's an enormous amount of evidence in the record about how  
5 the harm was felt in this state.

6           Quickly -- how much time do you think I have,  
7 Your Honor?

8           THE COURT: Well, I was going to give you the  
9 five-minute warning in about five minutes. So you have ten  
10 minutes.

11          MR. NETA: Ah. Okay. I'm not sure I'm going to take  
12 all of my time, then, Your Honor.

13          THE COURT: Wait a minute. Yeah, you've got 10  
14 minutes if you want it.

15          MR. NETA: Okay.

16          THE COURT: All right. I was thinking that there was  
17 going to be a rebuttal from you, but there really wouldn't be.

18          MR. NETA: There might not be.

19          With respect to the reasonableness factors, the seven  
20 factors, again, purposeful interjection, I think it's clear from  
21 the record that there was that with respect to the State of  
22 Washington.

23          The burden on the defendants, as Your Honor noted,  
24 earlier, it has changed quite a bit in the last 24 years. It is  
25 quite easy for parties to litigate a case online in this era.

1 Certainly, parties are free to attend, but it's very easy to  
2 take depositions by video, to participate by phone call. And  
3 there's no question that we could do a lot of that in this case,  
4 should need arise.

5 THE COURT: Well, it was an issue when I was in  
6 practice, and I went through in practice over and over and over  
7 with cases that I worked on, that when you're -- I think this is  
8 the rule generally -- when you're the plaintiff, and you want to  
9 take a deposition of somebody who lives in Dubai, you either  
10 have to do that on the phone, by video, or go to Dubai. It's  
11 pretty rare that you're going to get a court to agree to force  
12 that Dubai witness to the State of Washington.

13 MR. NETA: On tissue of Dubai, I was just litigating  
14 days in the Northern District of California. Again, I was the  
15 plaintiff, representing the plaintiff in that case. The  
16 defendant was a free-zone LLC, a Dubai free-zone LLC, and the  
17 CEO of that company was based in Dubai, and I had to take that  
18 deposition over video. It's certainly something that I think  
19 technology allows us to do rather fluidly.

20 THE COURT: The point I'm trying to make is that the  
21 burden of this out-of-jurisdiction litigation, we'll call it,  
22 falls on both sides.

23 MR. NETA: I think that's right.

24 And on that issue, as an extension the question of ads  
25 being placed in the State of Washington vis-a-vis elsewhere in

1 the United States, you're absolutely right, Your Honor, if --  
2 unless, unless a company is specifically not trying to focus  
3 their efforts and attentions on a given state, the fact that  
4 they are asking Yahoo! or some other affiliate to place  
5 advertisements somewhere in the United States that has a  
6 footprint in the State of Washington, they should accept the  
7 fact that that's going to be -- that's going to give rise,  
8 potentially, to a jurisdictional argument there.

9 Certainly, in the State of Washington, there's an  
10 enormous amount of industry related to security research, and  
11 breach, and protection.

12 THE COURT: Seems to me -- you know, it's a number of  
13 years ago that I took civil procedure in law school, which is  
14 probably true for everyone in this courtroom. But it seems to  
15 me, as we go through changes in the way we do business, that  
16 seems to prompt changes in the law regarding personal  
17 jurisdiction.

18 I just wonder if we're at that point where -- when I  
19 was in law school, the changes were, you know, the use of  
20 telephones and fax machines. Now it's electronic, and you can  
21 put an ad here in the State of Washington on Yahoo!, or Google,  
22 or Facebook, and it can be read by someone in Dubai, and your  
23 product can be purchased.

24 MR. NETA: They certainly gain the benefit of being  
25 able to advertise in this state. Why shouldn't there be a

1 corresponding burden?

2 And you're absolutely right, the arc of cases with  
3 respect to personal jurisdiction and minimum contacts, if you  
4 want to think broadly, over the last hundred years, is  
5 consistently bent towards this zone in which people are,  
6 jurisdiction is held because, from a technological perspective,  
7 it's very easy for all litigants to participate in the case.  
8 It's never been something that has arisen as an issue, I think,  
9 in any cases that I've helped that have dealt with this fear of  
10 industry.

11 THE COURT: Okay.

12 MR. NETA: I think the other issues with respect to  
13 reasonableness all weigh in our favor. There's no serious  
14 conflict between our state and any of the other states where  
15 defendants are located. We do have a significant interest in  
16 hearing this case here because of the damage that was caused to  
17 Washington employees, Washington residents.

18 And, most importantly, before I end, I don't think  
19 that there's any alternative forum. Defendants have all  
20 indicated to you we have Mr. Ragan located in Indiana, CXO and  
21 IDG that are located in Massachusetts, and Kromtech, which we  
22 alleged in our pleading was a German company, but in their  
23 declaration state that they're a British Virgin Islands  
24 corporation, with its principal place of business in Dubai.

25 If the case doesn't proceed in Washington, where the

1 witnesses with respect to harm and damage and reputation  
2 aren't -- are located, then where else would it take place?

3 THE COURT: I take note of the fact that -- I realize  
4 you start with a three-part test, and with each of those parts  
5 you've got seven parts, and it's just too many parts to look at,  
6 but we'll look at them all.

7 But it comes down to, really, this general rule: The  
8 personal jurisdiction is governed -- and this is what every case  
9 says -- minimum contacts are required. Minimum contacts are  
10 required. But the intent is to do fair play and substantial  
11 justice.

12 MR. NETA: Right.

13 THE COURT: Does that weigh into your argument in any  
14 way?

15 MR. NETA: Absolutely, Your Honor. The conduct that  
16 we've alleged, and the evidence that we have presented in  
17 support of it, all demonstrate that numerous employees lost  
18 their jobs, lost their livelihoods, have suffered enormously.  
19 Businesses were lost, businesses were eviscerated.

20 As of today, River City is no more. River City, a  
21 Washington business, even though it wasn't registered to conduct  
22 business in the State of Washington, even though it's  
23 incorporated elsewhere, located in the State of Washington,  
24 suffered enormous harm. And forcing River City to essentially  
25 litigate this case in Indiana, Massachusetts, or, God forbid,

1 Dubai, would not comport with notions of substantial justice or  
2 fair play, especially given that they've hired counsel that have  
3 appeared here, admitted pro hac vice, and seem to be prepared to  
4 defend this case.

5 THE COURT: Do you have to be registered in the State  
6 of Washington to do business in the State of Washington?  
7 Corporate law was not my specialty when I was practicing, and I  
8 just haven't had to look at that issue.

9 MR. NETA: As far as I understand, Your Honor, if the  
10 rules are anything like California, and I believe they are  
11 somewhat, you don't need to be registered in the State of  
12 Washington to conduct business in the State of Washington.

13 But that, in and of itself, Your Honor, isn't even a  
14 jurisdictional question. Companies from Wyoming, from Germany,  
15 from anywhere, can hang out a shingle in a state and conduct  
16 business. And there may be a question as to whether or not  
17 they'd be allowed to defend a suit brought against them or  
18 enforce a contract that they enter into with an in-state  
19 resident, but that doesn't enter into the question of  
20 jurisdiction.

21 THE COURT: Okay.

22 MR. NETA: And if you have any other questions.

23 THE COURT: I don't have any other questions. You  
24 have more time, but you don't have to use it.

25 MR. NETA: I will save it for rebuttal, if need be.

1 THE COURT: All right.

2 MR. NETA: Thank you, Your Honor.

3 THE COURT: All right. Mr. Babcock, I'll give you  
4 five minutes. Do you want to share that with Mr. Stowe?

5 MR. BABCOCK: No, I'm done sharing with him.

6 THE COURT: Does Mr. Stowe want you to share it?

7 MR. BABCOCK: He probably does. He's eager, you know,  
8 always.

9 I was not and am not a corporate law specialist, but I  
10 did read the Washington Revised Code, and, on registration, if  
11 they gross more than \$12,000 a year, they're required to  
12 register with the Secretary of State here. And if they don't,  
13 they can't pursue a lawsuit until they do register and pay their  
14 back taxes.

15 THE COURT: Is that true for federal courts as well?  
16 I just don't know.

17 MR. BABCOCK: Would that be true in federal court? To  
18 be honest with you, I don't know. But the statute doesn't make  
19 a distinction between state and federal court. But the answer  
20 is I don't know --

21 THE COURT: Okay.

22 MR. BABCOCK: -- on that.

23 You talked about how the burden has changed because,  
24 you know, we're flying out from all different places, and we've  
25 got the Internet and everything. And I think it's a fascinating



1 point. Mr. Stowe and I actually were talking about it last  
2 night. The ease of travel, and the ease of communication has  
3 dramatically changed since *International Shoe*, and when  
4 Mr. Kroll would have had to, you know, hitch up the wagon and  
5 put all his trial boxes in there and come across the country to  
6 litigate a case. And yet, and yet, in the past three years, the  
7 United States Supreme Court, which, obviously, is the supreme  
8 law of the land, has tightened up personal jurisdiction.  
9 Remarkably so.

10 And one of the cases is pertinent to the argument that  
11 plaintiffs' counsel made, but *Daimler v. Bauman* has very much  
12 constricted general jurisdiction.

13 *Walden v. Fiore*, which is the case that I think  
14 impacts here, has changed the effects test. He argues --  
15 counsel argues that, well, they lost their lease, you know,  
16 they've got employees who were affected, and this is all  
17 happening in Washington, and so the effect of this, of this  
18 publication by my client and by the other defendants has  
19 affected them here.

20 Well, *Walden* says that, straight up, the suit must  
21 arise out of or in relation to defendant's contacts with the  
22 state. The mere fact that defendants conduct activities affects  
23 it in the forum, that the defendant's conduct affects plaintiffs  
24 in the forum, is insufficient. That's a change, clearly a  
25 change in the law. I'm surprised that they didn't overrule the

1     *Jones* case. But, nevertheless, that's what we've heard.

2             This term, in *Bristol-Myers*, they said that that  
3     general and specific jurisdiction are entirely different,  
4     distinct tests. It's error to allow the factors relevant to one  
5     to influence the other. That's constricting personal  
6     jurisdiction. This term they said, in *BNSF Railway v. Tyrrell*,  
7     that legislative venue choices don't affect personal  
8     jurisdiction.

9             So, yeah, life has gotten easier, but the Supreme  
10    Court has not expanded jurisdiction. In fact, it's gone the  
11    other way. And, you know, we think that the *Walden* case is just  
12    straight on point. The plaintiffs cannot be the only link  
13    between the defendant and the forum, the Supreme Court says in  
14    *Walden*. Rather, it is the defendant's conduct that must form  
15    the necessary connection with the forum state that is the basis  
16    for its jurisdiction over him. And --

17            THE COURT: Mr. Babcock, maybe I'm making this too  
18    simple. And if I am, that's why I ask the question, and you can  
19    tell me. But if the plaintiffs have personal jurisdiction over  
20    Mr. Vickery, don't they also have the jurisdiction over  
21    Mr. Vickery's principal? Now, I realize that you may be arguing  
22    that there's no principal/agent relationship, but that's not  
23    really the purpose of the hearing today.

24            MR. BABCOCK: Right. Well, I don't think there's been  
25    an allegation that Mr. Vickery is our principal -- is our agent.

1           THE COURT: I should have used Mr. Ragan, then, for  
2 your client.

3           MR. BABCOCK: Mr. Ragan would be different.

4           THE COURT: Thank you.

5           MR. BABCOCK: And their allegation about Mr. Ragan is  
6 only that he interviewed or talked to a California resident and  
7 published an article.

8           Now, they do have a conclusory pleading in all their  
9 causes of action that says this, and I'll take their first cause  
10 of action.

11          THE COURT: What paragraph are you on?

12          MR. BABCOCK: Paragraph 83, they talk about Defendant  
13 Vickery. This is their first cause of action. This is repeated  
14 in all but their defamation and tortious interference.

15          So, paragraph 83 Vickery. Paragraph 84, Vickery.  
16 Paragraph 85, Vickery. Paragraph 86, Vickery. Paragraph 87,  
17 Vickery. Paragraph 88, Vickery.

18          And then we get to paragraph 89. Vickery undertook  
19 these actions personally and with the knowledge, approval,  
20 and/or ratification of Kromtech, CXO, Ragan, and the remaining  
21 defendants. I assume that they mean, by that, IDG.

22          That is the only allegation in their causes of action.  
23 And that's repeated in paragraph 97, 106, 115, 121, 139, 147.  
24 And as you pointed out in the *Mirza Minds* case, that is just not  
25 enough. And we could leave it right there based on their

1 pleading, but we took it further, and we have uncontroverted  
2 declarations from CXO, from IDG, from Mr. Ragan, that he's --  
3 they have no relationship with Mr. Vickery other than as a  
4 source for a news article.

5 And, you know, we pointed out that even if one  
6 assumes, as is alleged, that Mr. Vickery was engaged in improper  
7 conduct, the Supreme Court case, *Bartnicki v. Vopper*, says that  
8 the press, you know, is not liable for those things unless it  
9 participated in the underlying criminal misconduct.

10 So, from a jurisdictional standpoint, they haven't  
11 even pled anything.

12 THE COURT: You're at your five minutes.

13 MR. BABCOCK: Excuse me?

14 THE COURT: You're at your five minutes, but I'll  
15 allow you to wrap up.

16 MR. BABCOCK: Okay. Thank you.

17 THE COURT: So for all the above-stated reasons,  
18 you're asking for a dismissal.

19 MR. BABCOCK: Yes, for the foregoing reasons,  
20 Your Honor, we will submit that our motion ought to be granted.  
21 Thank you.

22 THE COURT: Thank you, Mr. Babcock.

23 Mr. Brown, I'll give you five minutes.

24 MR. BROWN: Thank you.

25 So I'll just try to hit a few very focused issues,

1 since this is rebuttal. One point that I would make is, you  
2 know, there's been -- I just want to make sure that we're  
3 staying focused on what the, what the actual test is.

4 THE COURT: You really mean me being focused, right?

5 MR. BROWN: No. And counsel as well. I think  
6 Mr. Neta very ably took the argument in a direction that was  
7 favorable to his position. But, you know, we have to be careful  
8 not to allow a personal jurisdiction discussion to get into this  
9 kind of generalized gestalt sense of whether it would be, you  
10 know, too difficult to participate in things by telephone or hop  
11 on a plane. There's a very kind of regimented test that they  
12 have to go through.

13 And I agree wholeheartedly with Mr. Babcock's sort of  
14 gloss on the last several years of Supreme Court jurisprudence.  
15 There's really no getting around it once you dig into that case  
16 law. The Supreme Court has tightened this up a lot.

17 And the *Walden v. Fiore* case, to come back to that, a  
18 2014 case, so a very recent case, there's an interesting passage  
19 here. The court stressed, and I'm quoting:

20 Due process limits on the state's adjudicative  
21 authority principally protect the liberty of  
22 the nonresident defendant, not the convenience  
of plaintiffs or third parties.

23 So the focus, as has been very clear, is on the  
24 liberty interests of defendants, not on the convenience of  
25 plaintiffs. It can be very, very easy to lose sight of that

1 when we're talking about all these other considerations,  
2 particularly in the third prong, which you shouldn't even get  
3 to.

4 I would also just add that even with the sort of  
5 increasing prevalence of the Internet and how interconnected we  
6 are, it still hasn't led to universal jurisdiction, right? So  
7 that if that were really the driving consideration, it wouldn't  
8 even matter what kind of case it was, right? Basically, it  
9 would just be in the realm of universal jurisdiction. But the  
10 Supreme Court and appellate courts there haven't gone that  
11 route.

12 THE COURT: We're not there yet.

13 MR. BROWN: What's that?

14 THE COURT: We're not there yet.

15 MR. BROWN: Not yet, and maybe never.

16 Secondly, just to reiterate, Mr. Neta, in his  
17 argument, yet again, said that the fact that the damages were  
18 felt in Washington state was enough. And that's just simply  
19 flat out wrong under the case law. The *Walden* case, again, said  
20 and I quote: As previously noted -- there was a whole  
21 discussion about this.

22 As previously noted, *Calder* made clear that  
23 mere injury to a forum resident is not  
sufficient connection to the forum."

24 Straight up. That was the case about seizure of money  
25 in the airport in Georgia by law enforcement, and the people

1 whose money was seized lived in Nevada, and they held no  
2 personal jurisdiction over law enforcement officer in Nevada.  
3 And that was the case even though, even though the respondents  
4 lived in Nevada and couldn't access the funds there that had  
5 been seized. The police officer, who was basically authorized  
6 to be a DEA agent, submitted a false affidavit, knowing that it  
7 would cause foreseeable harm to respondents in Nevada. That's  
8 considered a fact that the court considered.

9 The respondents' Nevada attorney had communications  
10 with the law enforcement officer in Georgia. Some of the cash  
11 that was seized had originated in Nevada. The funds were  
12 eventually returned to Nevada. All of those didn't matter.  
13 Still no jurisdiction.

14 And then I might just also touch on this issue of  
15 agency, which, obviously, as Mr. Neta has conceded, is the  
16 critical issue for them on personal jurisdiction as it pertains  
17 to Kromtech Alliance Corp. And Your Honor may have indicated,  
18 or at least floated the idea that this would be something to be  
19 addressed in summary judgment, not now. I don't agree with  
20 that. I think it can absolutely be dealt with now at the motion  
21 to dismiss stage.

22 And if you look at the *Wilcox* case, again, Washington  
23 Supreme Court case from earlier this year, in -- that was also a  
24 case that involved a contract. And the parties had sort of  
25 differing views on the contract. And the court itself even

1 said, at first blush when we looked at the contract, we thought  
2 there might be contradictory provisions. But the court dug into  
3 the contract, interpreted it, and held as a matter of law that  
4 there was no agency, no right to control the details of the work  
5 there.

6 So in that same way, there's really no reason that it  
7 can't be dealt with as a matter of law. And we don't need to  
8 get into discovery, and then all the way through to the motion  
9 for summary judgment, only to litigate the issue of whether  
10 there's sufficient agency showing to hale Kromtech into court in  
11 Washington.

12 THE COURT: Okay. You're at your five minutes. If  
13 you want to wrap up, you may.

14 MR. BROWN: I am wrapping up. Thank you.

15 THE COURT: Thank you, Mr. Brown.

16 Mr. Neta.

17 MR. NETA: Very brief, Your Honor.

18 THE COURT: I typically don't do this. Let me  
19 explain. I'll give you two minutes. It is not your motion, but  
20 it is your burden. So I think, since you're facing six against  
21 two, I'll give you two minutes to sum it up.

22 MR. BABCOCK: Fair fight, Your Honor.

23 MR. NETA: Thank you. I'll keep it very brief.

24 The Washington statute that was referenced earlier, I  
25 believe it's discretionary, and I don't think it has any impact



1 on federal courts. While it might be true that the Supreme  
2 Court has tightened up general jurisdiction, I don't believe  
3 that's the case with specific. And it's certainly not the case  
4 of Internet actions.

5 A lot has been discussed about the *Walden* case, but I  
6 just want to quickly bring your attention --

7 THE COURT: And you're proceeding only under specific  
8 jurisdiction --

9 MR. NETA: That's correct, Your Honor.

10 THE COURT: -- for all of the defendants, is my  
11 impression, after reading all the briefing.

12 MR. NETA: Precisely. If you look at Footnote 9 of  
13 the *Walden* case, it says specifically:

14 ... this case does not present the very  
15 different question whether and how  
16 defendant's virtual "presence" and conduct  
17 translate into "contacts" with a particular  
State. ... We leave questions about virtual  
contacts for another day.

18 So while that case did have something to say about  
19 constraining specific jurisdiction, it doesn't have any impact  
20 on this case, because that's not what this case is about. It's  
21 about Internet damage, Internet advertising commerce.

22 Quickly, on the issue of agency, I think there's  
23 enough evidence in the case so far to indicate that Kromtech had  
24 some agency control over Mr. Vickery. And as I said earlier,  
25 CXO doesn't really dispute the notion that they had agency

1 control over Mr. Ragan. There is a question about CXO and IDG  
2 and to the extent to which they're interrelated, but all I would  
3 say in response to that, Your Honor, is if you feel that  
4 question needs to be more appropriately addressed in the  
5 pleadings, we're happy to take jurisdictional discovery on  
6 certain questions so that we can resolve that issue.

7 THE COURT: Okay. Thank you.

8 MR. NETA: Thank you, Your Honor.

9 THE COURT: All right. I'll try to get a decision out  
10 as soon as I can. I do have a week-long trial that begins on  
11 Monday, so that will probably get in the way of this a little  
12 bit, but we'll work on it, get it out as soon as we can. It  
13 will be a couple weeks.

14 But I've enjoyed our time this afternoon. And thank  
15 you for being prepared, organized, and efficient.

16 MR. NETA: Thank you.

17 MR. BABCOCK: Thank you, Your Honor,

18 (ADJOURNMENT at 2:39 P.M.)  
19  
20  
21  
22  
23  
24  
25

1 REPORTER'S CERTIFICATE

2  
3  
4  
5 I, LYNETTE WALTERS, Registered Professional Reporter,  
6 Certified Realtime Reporter and Certified Court Reporter;

7 DO HEREBY CERTIFY:

8 That the foregoing transcript, Pages 1 through 50,  
9 contains a full, true, complete and accurate transcription of my  
10 shorthand notes of all requested matters held in the foregoing  
11 captioned case, including all objections and exceptions made by  
12 counsel, rulings by the court, and any and all other matters  
13 relevant to this case.

14 DATED this 12th day of September, 2017

15  
16  
17 s/ Lynette Walters  
18 LYNETTE WALTERS, RPR, CRR, CCR  
19 CCR NO. 2230  
20  
21  
22  
23  
24  
25